

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

**FRANK FAGONE**

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)

**Criminal No. 06-10242-RWZ**

**v.**

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)

**UNITED STATES OF AMERICA**

**MOTION TO ALTER OR AMEND JUDGMENT**

NOW COMES Movant Frank Fagone ("Fagone"), acting *pro se*, and moves this Honorable Court, pursuant to F.R.Civ.P. 59(e), to alter or amend its judgment dated June 19, 2009, in which the Court denied Fagone's 28 U.S.C. § 2255 motion.

In support of this motion Fagone states the following:

1. In his memorandum of law in support of his Section 2255 motion, Fagone asserted that his attorney provided constitutionally ineffective assistance (a) by erroneously calculating the applicable Guideline sentencing range which resulted in Fagone pleading guilty with the misunderstanding of his sentencing exposure (Fagone's Memorandum at pages 2-5); and (b) by failing to object to the use of prior convictions relied upon to establish Fagone's status as career offender. *Id.* at pages 5-6. Strictly construed, these claims are belied by the record. However, in Fagone's reply to the Government's response in opposition to Fagone's Section 2255 motion dated June 3, 2009, Fagone clarified the essence of his claims.

2. As articulated in his reply brief, the true thrust of Fagone's claim is that the District Court erred (1) in determining that the State court record was determinative on the question of whether Fagone had receive a proper plea colloquy on his prior convictions, and (2) in determining that Fagone had failed to meet his burden with respect to his challenge to the career offender

enhancement, and thus that trial counsel provided constitutionally ineffective assistance (1) by not properly challenging the proposed career offender enhancement, and (2) by not appealing the District Court's findings on the matter.

3. It appears from the Court's order denying habeas relief that the Court did not consider Fagone's reply brief in adjudicating his Section 2255 motion. For example, the Court did not mention the case cited by Fagone that is nearly identical to issue in the matter *sub judice*, i.e., *United States v. Gray*, 177 F.3d 86 (1st Cir. 1999). Indeed, the Court did not address any portion of Fagone's reply brief.

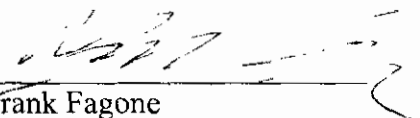
4. Judging from the date of Fagone's reply and the date of the Court's order, it appears that the Court may have drafted its order prior to receiving Fagone's reply.

5. Fagone respectfully submits (1) that the State Court records did not prove any evidence that he received a proper plea colloquy with respect to his prior convictions, and (2) that by filing a sworn affidavit, he met his burden at sentencing in showing that he did not receive a proper plea colloquy with respect to those convictions. He further submits that trial counsel could have successfully challenged the proposed career offender enhancement, either at sentencing or on appeal, had he only read the *Gray* case.

6. Fagone beseeches this Honorable Court to reconsider its denial of Fagone's Section 2255 motion in the light of his clarification and the arguments and authorities contained in his reply brief. He should have received a sentence not exceeding 33 months. He received 120 months' imprisonment. Justice demands that *actual* claims be adjudicated on the merits. He does, after all, have but one bite at the habeas apple.

WHEREFORE, Fagone prays that this motion will be granted. Alternatively, Fagone would ask that the Court treat this pleading as a Notice of Appeal and a request for a certificate of appealability, with the arguments and authorities in support of the latter contained in his reply brief.

Respectfully yours,


  
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Frank Fagone  
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U.S. Penitentiary Big Sandy  
P.O. Box 2068  
Inez, Kentucky 41224

Dated: 6/24/2009

**CERTIFICATE OF SERVICE**

It is hereby certified that a true and correct copy of the foregoing was sent, via first-class prepaid mail, this 24<sup>th</sup> day of June, 2009, to the following counsel for the Government:

Mr. David G. Tobin  
Assistant United States Attorney  
District of Massachusetts  
One Courthouse Way - Suite 9200  
Boston, Massachusetts 02210

  
Frank Fagone